Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in ruling that mere exposure to a potentially harmful substance, in the absence of any physical injury or disease, is a sufficient basis for recovery under section 1 of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51?

2. Whether the Second Circuit erred in holding that under *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), the zone of danger test is satisfied in FELA cases where an employee alleges mere exposure over a period of time to a potentially hazardous substance, but where there is no claim of actual physical injury or risk or fear of immediate physical injury?

3. Whether the Second Circuit, in contravention of this Court's opinion in *Gottshall*, has improperly discarded the essential common law requirements imposed to place rational limits on liability for negligent infliction of emotional distress: namely, (i) proof of physical injury, (ii) evidence of physical manifestation of emotional harm, and (iii) proof of emotional distress that is severe and substantiated by objective medical, psychiatric or clinical evidence?

4. Whether the Second Circuit erred in ruling that FELA permits a totally asymptomatic plaintiff to recover damages for future medical monitoring costs, a ruling that is in direct conflict with FELA's express statutory requirement of "injury" as a prerequisite to recovery?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner, Metro-North Commuter Railroad Company, is a public benefit corporation of the State of New York and is a subsidiary of the Metropolitan Transportation Authority, a public benefit corporation of the State of New York. *See* New York Metropolitan Transportation Authority Act, N.Y. Pub. Auth. Law §§ 1260 to 1279-b (McKinney 1982 & Supp. 1996). Metro-North Commuter Railroad Company does not have any subsidiary companies.

Respondent Michael Buckley is an individual.

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, reproduced at Joint Appendix ("JA") 617-25, has not been officially reported. The opinion of the United States Court of Appeals for the Second Circuit (JA 631-51) is reported at 79 F.3d 1337.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 1, 1996, and Metro-North's timely petition for rehearing was denied on July 10, 1996. A petition for certiorari was filed on August 29, 1996, and granted on November 1, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, is set forth at JA 654-55.

STATEMENT OF THE CASE

This case arises from plaintiff Michael Buckley's exposure to asbestos-containing insulation while working for Metro-North as a pipefitter in Grand Central Terminal in New York City. (JA 618) Plaintiff seeks damages for negligent infliction of emotional distress and for future medical monitoring under FELA. (JA 620) Plaintiff is the "test plaintiff" for a group of approximately 140 plaintiffs, with varying degrees of alleged asbestos exposure, asserting similar claims against Metro-North. (JA 635)

The parties stipulated at trial that Metro-North had negligently allowed plaintiff to be exposed to asbestos between June 1985 and September 1987. (JA 594) Trial proceeded on the issues of injury, damages, and causation. Plaintiff testified that over the period in question he was exposed to

asbestos an average of one hour per day.[1] (JA 415; JA 618)

It is undisputed that plaintiff has no asbestos-related disease or physical injury and in fact shows no physical effect of any kind from asbestos exposure.[2] (JA 196; JA 619; JA 641) In 1990, plaintiff was examined, x-rayed and given pulmonary function tests by a doctor at Mount Sinai Medical Center, one of the world's leading research centers on asbestos and health, and no asbestos disease was found. (JA 460-63; JA 114-17) Plaintiff was again examined, x-rayed and tested at Mount Sinai in 1994. (JA 69-73) According to plaintiff's expert Dr. Steven Markowitz, who performed the 1994 examination, plaintiff "was fine." (JA 73) His "breathing was normal and the x-ray was normal." (JA 74) Dr. Markowitz testified that plaintiff "has absolutely no asbestos-related disease" and "has absolutely no pleural thickening." (JA 118) Dr. Markowitz stated that there was no evidence of a "clinical impact" from asbestos on plaintiff's lungs. (JA 135) Indeed, he could find no clinical evidence of disease or even of exposure. (JA 196)

It is also undisputed that plaintiff is not likely to develop an asbestos-related disease. (JA 640-41) Dr. Markowitz quantified plaintiff's risk of getting a disease "that he wouldn't have had had he not been exposed to the asbestos" as in the "1 or 2 or 3 percent" range. (JA 86) Dr. William Nicholson of Mount Sinai, plaintiff's expert in occupational environmental health hazards, testified that

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[1] Because the district court directed a verdict for Metro-North at the close of plaintiff's case, no ultimate findings of fact were made.

[2] Plaintiff's amended complaint expressly states that he is "not bringing a cause of action or claiming damages for the actual clinically diagnosed condition of asbestosis, lung cancer, or other asbestos-related disease or illness" or for any such condition "which may occur in the future." *See* Plaintiff's Amended Complaint ¶ 19. (JA 17)

plaintiff had an increased risk of dying from cancer as a result of his exposure to asbestos of between 1 and 5 percent. (JA 242) Dr. Nicholson further testified that "a death from asbestosis is not something Mr. Buckley has to worry about, although he might develop shortness of breath." (JA 243)

Plaintiff's claim for emotional distress is based solely on his own subjective testimony that he was "mad," "scared," "upset," and "angry" at Metro-North. (JA 443) He "wanted Metro-North to be held accountable for what they did." (JA 456, JA 458) Plaintiff does not suffer from any physical manifestation of his alleged emotional distress. His alleged distress is not documented by any objective medical, psychiatric or clinical evidence of any kind. (JA 623-25) He did not see a physician regarding his asbestos exposure until 1990, three years after his exposure had ended, when his attorney referred him to Mount Sinai. (JA 517-25) Plaintiff testified that he never sought or underwent psychiatric treatment, saw a social worker or counselor, or took any prescription drugs for his alleged emotional trauma and fear of asbestos-related disease. (JA 519-20) According to Dr. Markowitz, plaintiff did not display a level of concern warranting counseling. (JA 205-06; JA 624-25)

Plaintiff, who smoked approximately one pack of cigarettes per day, was shown a videotape by Metro-North in 1987 that graphically depicted persons dying of asbestos-related disease and warned that asbestos-exposed smokers could significantly reduce their risk of developing lung cancer if they quit smoking. (JA 619) Even after viewing the videotape, plaintiff continued to smoke approximately one pack of cigarettes per day until 1991. (JA 619) He testified that he still smokes cigarettes "whenever I feel like having one." (JA 491)

At the close of plaintiff's case-in-chief at trial, the district court (Hon. Whitman Knapp, U.S.D.J.) granted Metro-

North's motion for a directed verdict. The district court held that plaintiff's exposure to asbestos did not satisfy the common law "zone of danger" test, which this Court has adopted as a limitation on recovery for negligent infliction of emotional distress under FELA. (JA 620 (citing *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994))). The district court also found that plaintiff "offered no objective evidence by which a jury could determine that he had suffered a real emotional injury" (JA 625) and that "there [was] no way for a jury to determine whether plaintiff's alleged fear of developing the disease was reasonable." (JA 623)

The Second Circuit reversed, holding that plaintiff could recover for negligent infliction of emotional distress because his exposure to asbestos was a "physical impact" and, by itself, satisfied the *Gottshall* zone of danger test. (JA 640-46) The Second Circuit stated that plaintiff could recover even though he did not suffer severe emotional distress or psychiatric harm, showed no physical manifestation of emotional distress, and presented no competent psychiatric, medical or clinical evidence of emotional distress. (JA 647-48) Further, the Second Circuit held that, despite the absence of physical injury or any likelihood of future injury, plaintiff could recover medical monitoring damages under FELA. (JA 648-51) On July 10, 1996, the Second Circuit denied Metro-North's timely petition for rehearing with suggestion for rehearing en banc. (JA 652-53)

SUMMARY OF ARGUMENT

The Second Circuit in this case held that a plaintiff suing under FELA may recover for emotional distress and medical monitoring if he has been "physically impacted" by exposure to asbestos, even though he has not developed and, according to his own experts, probably will never develop any disease or injury as a result of that exposure. The Second Circuit's decision impermissibly rejects the

overwhelming majority of FELA and common law authority, which holds that exposure to asbestos, without asbestos-related physical injury, does not constitute a basis for recovery. *See, e.g., Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985). As the Third, Fourth, and Fifth Circuits and numerous other courts have held, this majority rule properly governs all claims based on asbestos exposure, including claims for emotional distress and fear of cancer. By allowing an asymptomatic plaintiff to pursue claims for emotional distress and future medical monitoring costs, based on his mere exposure to asbestos, the Second Circuit has drastically and improperly expanded liability under FELA.

The Second Circuit's decision also is fundamentally inconsistent with this Court's recent decision in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). In *Gottshall*, this Court held that emotional distress, absent physical injury, is compensable under FELA only if it meets the threshold standard of the common law "zone of danger" test. *See* 512 U.S. at 556. In determining that plaintiff's exposure over time to asbestos satisfied the zone of danger test, the Second Circuit wrenched the test out of its common law boundaries. Well-settled law has restricted the test to claims arising out of sudden accidents or other traumatic events, which threaten a plaintiff with *imminent* physical harm, thereby causing the plaintiff to suffer fright and to fear for his own safety. Contrary to the Second Circuit, recent FELA decisions by federal and state appellate courts make clear that these traditional elements are required under the *Gottshall* zone of danger test. Moreover, the Second Circuit's decision conflicts with decisions by the Fifth Circuit and other courts, which have held that under the common law asbestos exposure cases do not meet the zone of danger test because these traditional elements are absent. In fact, Metro-North has found no other

decision ruling that the zone of danger test is met in this context.

Plaintiff's failure to satisfy the threshold zone of danger test in itself defeats his emotional distress claim. Plaintiff's claim, however, also fails to meet all the other requirements that the common law imposes -- and the Second Circuit rejected -- to place rational limits on liability for negligent infliction of emotional distress: namely, that a plaintiff's distress be severe, result in a physical manifestation, and be established by competent medical, psychiatric or clinical evidence. The Second Circuit's rejection of these requirements is irreconcilable with this Court's pronouncement in *Gottshall* that under FELA courts are not free to discard such common law restrictions on "the specter of unlimited and unpredictable liability." *See* 512 U.S. at 557.

The combined effect of the Second Circuit's holdings is an unprecedented and unjustifiable expansion of liability for negligent infliction of emotional distress. Under the Second Circuit's decision, every railroad worker alleging mere exposure to asbestos or other potentially harmful substances may have a claim under FELA for emotional distress, including distress that is trivial, insubstantial, or evanescent. Such a result is contrary to the great weight of authority under both FELA and the common law.

Finally, the Second Circuit's holding that a claim for medical monitoring damages is cognizable under FELA despite the absence of any physical injury is directly contrary to the statute's express requirement of an "injury" as a precondition to recovery.[3] *See* 45 U.S.C. § 51. Moreover, it

[3] Plaintiff's purported need for medical monitoring does not arise from his alleged emotional injury, but rather from the possibility that he may at some time in the future develop an asbestos-related physical injury. Therefore, his alleged emotional injury cannot serve as the basis for recovery of medical monitoring damages.

is contrary to the basic common law principle that there can be no cause of action in tort without an actual injury. As *Schweitzer* and other cases make clear, under FELA, "injury" from asbestos exposure exists, and a cause of action may be deemed to have accrued, only when an asbestos-related disease is present. Alleged "subclinical changes," without any impairment or disease, are just that: merely changes, not cognizable injuries. *See Schweitzer*, 758 F.2d at 942; *cf. Urie v. Thompson*, 337 U.S. 163, 169-70 (1949) (worker exposed to silica dust is injured, and his cause of action accrues under FELA, only when adverse effects manifest themselves).

The Second Circuit's expansive rulings, if affirmed, will have extraordinary economic consequences upon railroads under FELA as well as upon other entities, governmental and non-governmental, under other federal statutes and the common law. The Second Circuit attempted to minimize the importance and influence of this case by stating that its rulings applied only to "massive[ly]" exposed railroad workers suing under FELA. (JA 645) However, the legal and factual issues presented by this case are not peculiar to FELA or to railroad workers, or even to asbestos. Rather, they are recurring issues in cases involving exposure to potentially harmful substances where a plaintiff has not as yet developed a physical injury and may never do so. Clearly, this case will influence the development of the law in every jurisdiction that is now or may in the future be grappling with these issues. Metro-North respectfully submits that a reversal of the Second Circuit's decision by this Court would not only be legally correct under FELA, but would advance important policy concerns affecting the

nation's courts, individual litigants, businesses, and the public at large.

ARGUMENT

I. THE SECOND CIRCUIT ERRED IN HOLDING THAT AN ASYMPTOMATIC PLAINTIFF WHO WAS EXPOSED TO ASBESTOS MAY RECOVER UNDER FELA FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The Second Circuit held in this case that exposure to asbestos, without any indication of disease or injury, can serve as a basis for recovery for the negligent infliction of emotional distress under FELA and the zone of danger test adopted by this Court in *Gottshall*. In so holding, the Second Circuit expressly "rejected the FELA cases finding that asbestos fiber inhalation cannot constitute an injury," including specifically the Third Circuit's decision in *Schweitzer*. (JA 643) The *Schweitzer* rule is identical to the common law of the vast majority of jurisdictions, including cases where claims for emotional distress or fear of cancer have been asserted. In abandoning the rule adopted by the overwhelming number of courts, the Second Circuit improperly ignored this Court's admonition in *Gottshall* to adhere to the common law in deciding FELA cases. *See Gottshall*, 512 U.S. at 543-44, 554-55, 557. Moreover, the Second Circuit's decision flies in the face of the policy concerns that underlie the common law and that are central to this Court's FELA jurisprudence.

A. Contrary to the Second Circuit, the Overwhelming Majority of Authority under FELA and the Common Law Correctly Requires Physical Injury as a Prerequisite to Recovery for Emotional Distress in Cases Involving Exposure to Potentially Harmful Substances

In *Schweitzer*, an asbestos exposure case arising under FELA, the Third Circuit held (in contrast to the Second Circuit here) that "subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law." *Schweitzer*, 758 F.2d at 942. The *Schweitzer* court relied on this Court's landmark decision in *Urie v. Thompson*, 337 U.S. 163, 170 (1949), where this Court ruled that an employee exposed to silica dust "can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves." Although *Schweitzer* is not an emotional distress case, the *Schweitzer* rule properly governs claims for emotional distress arising from asbestos exposure. As discussed below at Point II, in the absence of physical injury, emotional distress claims are cognizable under FELA only when they meet the zone of danger test. The required elements of that test are not met in asbestos exposure cases, and therefore, physical injury remains a prerequisite to recovery.

The Second Circuit's refusal to apply the rule in *Schweitzer* conflicts with the overwhelming majority of asbestos exposure cases under FELA, the Jones Act,[4] other

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[4] The Jones Act incorporates Section 1 of FELA, 45 U.S.C. § 51. *See* 46 U.S.C. app. § 688(a). In determining the scope of liability under the Jones Act, as well as under general federal maritime law, courts look to case law under FELA. *See, e.g., Chan v. Society Expe-*

federal statutes, and the common law, in which claims for emotional distress or fear of cancer have been alleged. For example, the court in *Amendola v. Kansas City Southern Railway Co.*, 699 F. Supp. 1401 (W.D. Mo. 1988), dismissed claims brought under FELA for mental anguish allegedly caused by asbestos exposure where there was no physical harm, noting that such a rule was necessary to "keep[] the floodgates intact." 699 F. Supp. at 1410-11. *See also Batko v. Ogilvie*, No. 85 C 7873, 1986 WL 5761, at *1-3 (N.D. Ill. May 9, 1986) (dismissing FELA claims based on asbestos exposure where no current injury was alleged, citing *Schweitzer*); *In re Asbestos Prods. Liab. Litig. (No. VI)*, Civ. A. No. 2 MDL 875, 1996 WL 239863, at *5 (E.D. Pa. May 2, 1996) (dismissing Jones Act and state law claims based on mere asbestos exposure). Similarly, courts have rejected claims for emotional distress based on exposure, without physical injury, to a potentially harmful substance, under the Federal Tort Claims Act and 42 U.S.C. § 1983. *See Redland Soccer Club, Inc. v. Department of Army*, 55 F.3d 827, 848 (3d Cir. 1995) (rejecting emotional distress claims based upon exposure to PCBs without present physical injury under the Federal Tort Claims Act and Pennsylvania law), *cert. denied*, 116 S. Ct. 772 (1996); *Fontroy v. Owens*, No. CIV. A. 86-4958, 1996 WL 571149, at *3-4 (E.D. Pa. Oct. 2, 1996) (rejecting emotional distress claims based on exposure without injury to asbestos under 42 U.S.C. § 1983).

Likewise, the Third, Fourth, and Fifth Circuits have held that under the common law exposure to asbestos or other substances, without physical harm, cannot support a claim for negligent infliction of emotional distress. In *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 274 (3d

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ditions, Inc., 39 F.3d 1398, 1408-09 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1314 (1995).

Cir. 1985), the Third Circuit concluded that under Pennsylvania law exposure to asbestos without physical injury does not support recovery for negligent infliction of emotional distress. Similarly, in *Ball v. Joy Technologies, Inc.*, 958 F.2d 36, 38 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992), the Fourth Circuit observed that under Virginia law "mere exposure of the plaintiffs to toxic chemicals does not provide the requisite physical injury to entitle the plaintiffs to recover for their emotional distress." So, too, in *Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 593 (5th Cir. 1986), the Fifth Circuit determined that Louisiana law did not permit recovery for emotional distress based on asbestos exposure where there is no physical injury from the exposure.[5]

In addition, numerous state courts have adhered to the *Schweitzer* rule and held that physical injury is a prerequisite to recovery for emotional distress claims based on exposure to asbestos and other harmful substances. Just recently, in *Simmons v. Pacor, Inc.*, 674 A.2d 232, 238 (Pa. 1996), the Supreme Court of Pennsylvania concluded that "[n]othwithstanding the fact that [plaintiffs'] fear pres-

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[5] *Accord, e.g., Deleski v. Raymark Indus., Inc.*, 819 F.2d 377, 380 (3d Cir. 1987) (New Jersey and Pennsylvania law) (no cause of action for negligent infliction of emotional distress based on asbestos exposure in the absence of physical injury); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1569-70 (D. Haw. 1990) (Hawaii law) (same); *Bondy v. Texas Eastern Transmission Corp.*, 701 F. Supp. 112, 114 (M.D. La. 1988) (Louisiana law) (present PCB-related injury a predicate for recovery for mental anguish arising from exposure to PCBs), *aff'd*, 872 F.2d 422 (5th Cir. 1989); *cf. Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 412 (5th Cir.) (*en banc*) (Mississippi law) (asbestos exposure without physical harm not legally cognizable injury), *cert. denied*, 478 U.S. 1022 (1986); *Angus v. Shiley Inc.*, 989 F.2d 142, 147-48 (3d Cir. 1993) (Pennsylvania law) (denying recovery for negligent infliction of emotional distress to uninjured recipient of heart valve allegedly prone to failure).

ently exists, . . . because asymptomatic pleural thickening [from asbestos exposure] is not a sufficient physical injury, the resultant emotional distress damages are likewise not recoverable." The Supreme Court of Kentucky has rejected claims for emotional distress based on asbestos exposure unless "the plaintiff can cross the threshold of establishing a harmful change has resulted from exposure to the potentially cancer producing agent." *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 194 (Ky. 1994); *see also Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984) (in asbestos exposure case, requiring present physical injury as element of claim for mental anguish); *Locke v. Johns-Manville Corp.*, 275 S.E.2d 900, 905 (Va. 1981) ("legally and medically there was no injury upon inhalation of defendants' asbestos fibers").[6]

The application of the *Schweitzer* rule in emotional distress cases rests on the same principles and policy considerations that this Court identified in *Gottshall*. Specifically, this Court mandated in *Gottshall* that courts applying FELA must look to the common law's substantial limitations on recovery for purely emotional injuries. *See*

[6] *Accord, e.g., Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30-31 (Ariz. Ct. App. 1987) (citing *Schweitzer*, no recovery for emotional distress for plaintiffs with no asbestos-related disease because "[j]ustice would not be done either to the plaintiffs or the defendants by allowing a suit prior to manifestation of any physical injuries or disease"), *review dismissed*, 781 P.2d 1373 (Ariz. 1989); *Eagle-Picher Indus., Inc. v. Cox*, 481 So. 2d 517, 528 (Fl. Dist. Ct. App. 1985) (same), *review denied*, 492 So. 2d 1331 (Fla. 1986); *Doner v. Ed Adams Contracting, Inc.*, 617 N.Y.S.2d 565, 566 (App. Div. 1994) (denying recovery for emotional distress to uninjured, asbestos-exposed plaintiff); *cf. Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 542-43 (Me. 1986) (inhalation of asbestos is not compensable injury); *Pfizer, Inc. v. Farsian*, No. 1941153, 1996 WL 496381, at *3-4 (Ala. Aug. 30, 1996) (disallowing recovery for emotional distress of uninjured recipient of heart valve purportedly prone to failure).

Gottshall, 512 U.S. at 544-49, 554-57. The Second Circuit discounted the policies underlying these limitations and sought to minimize the effect of its ruling by noting that "only a narrow class of plaintiff may sue under FELA." (JA 645 (citing *Gottshall*, 512 U.S. at 559-60 (Ginsburg, J., dissenting))) In so doing, the Second Circuit ignored this Court's admonition in *Gottshall* that the need to carefully limit liability exists "as a practical matter in the FELA context as well, even though the statute limits recovery to railroad workers." *Gottshall*, 512 U.S. at 553.

Simply put, the fact that this is a FELA case does not mean that it is of narrow applicability. As the American Association of Railroads ("AAR") observes in its *amicus* brief, since 1990 more than 14,000 new asbestos personal injury cases have been filed under FELA against American railroads. *See* AAR Br. at 14. Furthermore, this case, if affirmed, will undoubtedly be cited as precedent by FELA plaintiffs alleging exposure to a host of other substances, such as chemical solvents, benzene, silica dust, and diesel fumes. *See id.* at 15 ("Since 1990, over 2000 FELA claims have been filed against railroads alleging exposure to various toxic substances (other than asbestos)."). Moreover, this Court's resolution of the issues in this case will undoubtedly be looked to as authority by untold thousands of litigants in common law actions brought against product manufacturers, sellers, and others.[7] Thus, if the Second

[7] Because this Court's FELA decisions analyze and apply common law principles, those decisions are frequently relied upon by courts and litigants in common law cases. For example, this Court's 1994 opinion in *Gottshall* has already been cited in a number of state court opinions. *See, e.g., Iacona v. Schrupp*, 521 N.W.2d 70, 72 (Minn. Ct. App. 1994); *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 442 (Tex. 1995). Similarly, this Court's opinion in *Urie* continues to exercise great authority in common law cases even after fifty years. *See, e.g., Haussecker v. Childs*, No. 08-95-00345-CV, 1996 WL 674430, at *5

Circuit's erroneous and unprecedented departure from the *Schweitzer* rule is affirmed, the threat of a flood of emotional distress claims by uninjured plaintiffs who have been exposed to asbestos or other substances will be real.

As the Third Circuit observed in *Schweitzer*, allowing recovery based on exposure alone would create limitless liability:

> If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do.

758 F.2d at 942. The *Schweitzer* court concluded that "[r]equiring manifest injury as a necessary element of an asbestos-related tort action avoids these problems and best serves the underlying purpose of tort law: the compensation of victims who have suffered." *Id.*

Similarly, United States District Judge Charles Weiner, who presides over the federal multidistrict asbestos personal injury litigation, recently dismissed the Jones Act and state law claims of 261 plaintiffs who alleged exposure to asbestos but had proffered no evidence of asbestos-related physical injury. *See In re Asbestos Prods. Liab. Litig.*, 1996 WL 239863, at *5. Judge Weiner observed that the "judicial system has been faced with an onslaught of per-

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(Tex. App. Nov. 21, 1996); *Rogerson v. Fitzpatrick*, 468 S.E.2d 447, 451 (N.C. Ct. App. 1996).

sonal injury, asbestos cases for more than twenty years." *Id.* at *2.[8] Citing the policy concerns set forth in *Schweitzer*, Judge Weiner emphasized that plaintiffs who actually have asbestos-related diseases "suffer while the [c]ourt [system] is clogged" with filings by exposed plaintiffs who (like plaintiff here) have no asbestos-related injuries. *Id.* at *5; *see also* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541, 575-76 (1992) (observing that "[v]irtually all asbestos-exposed but unimpaired workers can plausibly assert a cancerphobia claim" and arguing that "[a]s between the claims of the already impaired and the claims of those who are not now (and may never become) sick, but who genuinely fear becoming so, society should accord higher priority to the former").

B. The Second Circuit Erred in Permitting Recovery Based Upon "Massive" Exposure

In place of the *Schweitzer* rule, the Second Circuit announced a rule that purports to limit recovery to "unusual" cases of "massive" and "lengthy" asbestos exposure. (JA 645). Yet, the "massive" exposure standard adopted by the Second Circuit does not impose any meaningful constraints upon claims for emotional distress, as this Court's decision in *Gottshall* requires.

The term "massive" exposure is not, as the Second Circuit seems to believe, an objective or quantifiable standard by which to limit liability. On the contrary, the term

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[8] Judge Weiner reported that approximately 37,000 asbestos personal injury cases are now pending in the federal court system. *See* 1996 WL 239863, at *1. As of 1992, an estimated additional 130,000 asbestos cases were pending in state courts. *See* William W. Schwarzer *et al., Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute*, 73 Tex. L. Rev. 1529, 1530 (1995).

"massive" is inherently imprecise and without definition in the scientific and medical literature. The only guidance the Second Circuit provides is to distinguish "massive" exposure from every day exposure to asbestos in the "ambient air." (JA 643) Thus, "massive" exposure becomes any exposure to asbestos at some indeterminate level above normal background levels. Such an ill-defined standard potentially renders every workplace exposure a "massive" one.[9]

The illogicality of the Second Circuit's standard is underscored by the fact that "of those exposed to asbestos, only a small percentage suffer from asbestos-related physical impairment and that of the impairment group fewer still eventually develop lung cancer." *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. at 1569-70 (citing research). Indeed, as the Second Circuit recognizes, in spite of his so-called "massive" exposure, plaintiff here cannot establish that he is more likely than not to develop an asbestos-related disease. (JA 640-41) Moreover, as the Second Circuit also states, plaintiff's own experts could not find "any verifiable clinical signs of asbestos exposure." (JA 641)

In addition, the Second Circuit does not provide any factual basis for its assumption that plaintiff's exposure was "unusual." Indeed, a 1981 study for the United States

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[9] The Second Circuit, in classifying plaintiff's exposure as "massive," reasoned that "[o]ne need only visualize the image" of the plaintiff's appearance after an hour's labor (JA 641) -- hardly a scientific model or standard. There are no benchmarks whatsoever to use in determining whether an exposure is "massive." Under this undefined standard, any plaintiff who hires an expert, or even testifies as to his own appearance after exposure, will likely survive summary judgment. The jury will be left at best as the arbiter of a battle of the experts or, under the Second Circuit's approach, as the arbiter of plaintiff's appearance. The outcome is almost certain to be unpredictable and entirely subjective.

Department of Labor by a leading researcher on asbestos and health estimated that more than 21 million living American workers had been "significantly exposed" to asbestos during the previous 40 years. Irving J. Selikoff, *Disability Compensation for Asbestos-Associated Disease in the United States* xiv (1981); *see also Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1323 & n.15 (5th Cir. 1985) (*en banc*) (discussing Selikoff study); *Eagle-Picher*, 481 So. 2d at 528 & n.18 ("millions of people have been exposed to asbestos"; permitting uninjured plaintiffs to recover on a claim for fear of cancer "would likely devastate the court system as well as the defendant manufacturers"). Furthermore, the simple fact is that asbestos remains present in many of the nation's schools, homes, office buildings, factories, and public edifices. People repairing, renovating, demolishing, or removing asbestos from buildings have been, and undoubtedly will be in the future, exposed at times to significant levels of asbestos.[10] Such exposures will in all probability give rise to suits such as the instant one. An unlimited number of persons exposed to asbestos could thus plausibly assert that their asbestos exposure would be sufficient to entitle them to recover for emotional distress damages under the Second Circuit's ruling. Therefore, the "massive" exposure standard adopted by the Second Circuit in this case imposes no meaningful constraints upon claims for emotional distress.

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[10] *See, e.g.*, W. Keith C. Morgan & Anthony Seaton, *Occupational Lung Diseases*, 315 (1995); W. Raymond Parkes, *Occupational Lung Disorders*, 415 (3d ed. 1994).

C. The Second Circuit's Decision Will Create Intractable Problems with Regard to Claim-splitting and Statutes of Limitations

The Second Circuit's rejection of the *Schweitzer* rule does violence to the FELA and general common law proscription against claim-splitting. Although not considered by the Second Circuit, the "single recovery" rule established under this Court's FELA jurisprudence is unavoidably implicated by the Second Circuit's decision. This Court has held that under FELA only one recovery may be had by an employee for an employer's wrongful act, and that the employee's right to recover is then extinguished. *See Mellon v. Goodyear*, 277 U.S. 335, 344 (1928); *Flynn v. New York, N.H. & H. R. Co.*, 283 U.S. 53, 56 (1931); *cf. Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 598-99 (1974) (Powell, J., dissenting) (arguing that general maritime law should follow Jones Act and FELA, where if employee has "received satisfaction . . . by adjudication in the courts, no further right of action exist[s]").

In the usual zone of danger case, no issue of claim-splitting arises: a plaintiff who escapes physical injury at the time of an accident or other traumatic event is not at risk of developing future physical injuries as a consequence of that event. His only possible claim is for emotional distress. In contrast, in asbestos exposure cases, a plaintiff may develop one or more asbestos-related injuries years after exposure. Under this Court's prior FELA decisions, if permitted to sue for emotional distress based on exposure alone, a plaintiff would be barred from a second suit if he should later develop an asbestos-related disease. *Cf. Jackson*, 781 F.2d at 410-12 (under "single recovery" rule, a plaintiff suffering from one asbestos-related disease, such as asbestosis, may sue only once and must recover in that one suit damages for both his present disease and any other

ailment that he is more likely than not to develop in the future); *Burns*, 752 P.2d at 31 (rejecting claim for emotional distress based on asbestos exposure, stating "[a]llowing plaintiffs to sue for injuries when the disease is still subclinical would be an abrogation of the discovery rule in asbestos cases and mandate the commencement of a suit as soon as the contact with the asbestos fiber occurs, hardly a desirable result").

Although a number of jurisdictions have adopted a "separate disease" rule providing that asbestosis and cancer each constitute a separate cause of action even though arising from the same exposure to asbestos, *see, e.g., Eagle-Picher*, 481 So. 2d at 520,[11] no court has permitted claim-splitting that would allow emotional distress claims to be pursued separate and apart from physical injury claims. Moreover, as United States District Judge Spencer Williams observed in holding that emotional distress claims based on asbestos exposure without physical injury are not cognizable under Hawaii law,

> [a] consideration of when the statute of limitations would begin to run for emotional damages without underlying compensable harm provides further support for requiring such harm. Without a triggering event, a plaintiff could arbitrarily choose a date on which that plaintiff claims he or she could not adequately cope with fear of cancer. This possibility seriously undermines the policy that at some point in time the law should not recognize a claim.

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[11] The rationale of these cases is that asbestosis and cancer are independent disease entities -- i.e., that cancer does not develop from asbestosis; rather it is an entirely separate and discrete disease. *Id.* at 522.

> Conversely, defendants could gather evidence that plaintiffs knew or should have known at a time convenient for the defendants that plaintiffs' prior history of asbestos exposure might lead to cancer. . . . A regime of recovery for emotional distress not anchored to an underlying compensable harm presents boundless headaches in adjudicating statute of limitations problems.

In re Hawaii Fed. Asbestos Cases, 734 F. Supp. at 1570.

Clearly, the better rule in asbestos cases is that adopted by the overwhelming majority of courts, namely to restrict recovery for emotional distress to plaintiffs with actual physical injury caused by asbestos exposure.[12] The Second Circuit's rejection of that better rule in this case impermissibly diverges from the great bulk of authority under the common law and FELA. Moreover, the Second Circuit's decision conflicts with the fundamental policy considerations articulated by this Court in *Gottshall* and opens the courtroom door to tens of thousands (perhaps hundreds of thousands) of asymptomatic plaintiffs who have been exposed to asbestos or other potentially hazardous substances.

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[12] The cases relied on by the Second Circuit do not support abandoning the physical injury requirement: *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315, 316-17 (5th Cir. 1986) (plaintiff suffered dizziness, leg cramps, and a stinging sensation in his extremities, which court found to be physical injuries); *Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476, 478 (Ohio Ct. C.P. 1987) (plaintiff had a physical injury -- asbestosis).

II. THE SECOND CIRCUIT MISINTERPRETED AND MISAPPLIED THE ZONE OF DANGER TEST ARTICULATED BY THIS COURT IN *GOTTSHALL*

A. The Second Circuit Erroneously Abandoned All the Traditional Elements of the Zone of Danger Test

Instead of adhering to the physical injury requirement set forth for asbestos cases in *Schweitzer*, the Second Circuit incorrectly ruled that plaintiff's exposure to asbestos met the zone of danger test, which this Court adopted in *Gottshall*. To reach this result, the Second Circuit abandoned all of the traditional requirements of the zone of danger test, namely, (i) an accident, near accident or other traumatic event, which (ii) subjects the plaintiff to a risk of *imminent* physical harm, (iii) causing fright and resultant emotional injury. The Second Circuit's ruling is fundamentally inconsistent with and impermissible under this Court's decision in *Gottshall*.

In *Gottshall*, this Court determined that purely emotional distress is compensable under FELA only if it falls under the common law "zone of danger" test. 512 U.S. at 556. Under the zone of danger test, "a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not." *Id.* This test, which provides an exception to the general common law rule allowing recovery for emotional distress only where the plaintiff has suffered a physical injury, arose in response to a special category of cases involving accidents and near accidents in which a plaintiff suffered fright and severe emotional distress. As courts recognized, the general rule arbitrarily denied recovery to a physically uninjured plaintiff while permitting the slightly injured plaintiff standing next to him to recover, even though the two had

suffered the same fright and resultant emotional harm in a traumatic event. *See* Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm -- A Comment on the Nature of Arbitrary Rules,* 34 U. Fla. L. Rev. 477, 488 (1982). Thus, the zone of danger test is based on the "realization that 'a near miss may be as frightening as a direct hit.'" *Gottshall*, 512 U.S. at 547 (quoting Pearson, *supra*, at 488).

Courts have, however, defined specific boundaries to emotional distress claims under the zone of danger test so that every person who was ever frightened or claimed that his workplace was generally hazardous would not have a cause of action. The requirement that a plaintiff be within the zone of danger of imminent physical harm is ineluctably linked to recovery under the test; without such a risk of immediate harm, there can be no zone of danger.

The zone of danger cases which this Court cited in *Gottshall* make clear that the risk of imminent physical injury is an essential and defining element of the zone of danger test. The cases cited by this Court all involve collisions or near collisions of trains, streetcars and carriages, or other sudden, traumatic events that caused fright, with resultant mental injury, to the plaintiffs. *See Gottshall*, 512 U.S. at 547 & n.8. For example, in *Purcell v. St. Paul City Ry. Co.*, 50 N.W. 1034 (Minn. 1892), after a near collision of streetcars, a pregnant passenger was allowed to recover for fright and physical injuries resulting from fright. As the court explained,

> a *collision* seemed so *imminent*, and was so nearly caused, that the incident and attending confusion of ringing alarm-bells and passengers rushing out of the car caused to plaintiff sudden fright and reasonable fear of *immediate* death or great bodily injury, and

> that the shock thus caused threw her into violent convulsions, and caused to her, she being then pregnant, a miscarriage, and subsequent illness.

Id. at 1034 (emphasis added). Similarly, in *Mack v. South-Bound R. Co.*, 29 S.E. 905, 906 (S.C. 1898), the court allowed a plaintiff to recover who "just barely escaped being struck by the locomotive and cars, and . . . owing to the great and imminent danger . . . was terribly frightened, his nervous system was shocked, his mind was affected and partially destroyed, his reason unbalanced, and he, for a long time, was made ill and sick and suffered great mental anguish and physical pain."[13]

Nor have more recent cases expanded the boundaries of the zone of danger test. Such cases allow recovery only for fright and attendant emotional distress caused by danger of immediate physical injury from an accident or other

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[13] The other early cases cited by this Court in *Gottshall*, 512 U.S. 547 n.8, involve similar circumstances: *Simone v. Rhode Island Co.*, 66 A. 202, (R.I. 1907) (streetcar collision caused plaintiff fright resulting in fainting, vomiting, insomnia, headache, physical pain, three months in bed, and nervous disorders and weakness up to time of trial); *Kimberley v. Howland*, 55 S.E. 778 (N.C. 1906) (blasting sent rock crashing through plaintiff's house, causing plaintiff fright, shock, near miscarriage, and nervous physical pain and suffering); *Gulf, C. & S. F. Ry. Co. v. Hayter*, 54 S.W. 944 (Tex. 1900) (plaintiff in train collision could recover for fright and shock resulting in physical injury); *Pankopf v. Hinkley*, 123 N.W. 625 (Wis. 1909) (collision between car and horse-drawn carriage caused plaintiff severe fright and shock, and resultant miscarriage, severe pain and permanent injury to health); *Stewart v. Arkansas S. R. Co.*, 36 So. 676 (La. 1904) (fright from train accident resulted in plaintiff's miscarriage and subsequent ill health); *Watson v. Dilts*, 89 N.W. 1068 (Iowa 1902) (plaintiff suffered shock, fright, apprehension for her own life, prostration, nervous paralysis, and great mental and physical pain when defendant broke into home and assaulted husband).

sudden, traumatic event. For example, in *Robb v. Pennsylvania Railroad Co.*, 210 A.2d 709, 714 (Del. 1965), cited by this Court in *Gottshall*, 512 U.S. at 548 n.9, the Delaware Supreme Court adopted the zone of danger test to permit recovery for fright and emotional distress in a case where a plaintiff fled uninjured from her car seconds before the car was hit by a train.[14]

So, too, in FELA cases both before and after this Court's decision in *Gottshall*, the zone of danger test has been restricted to claims arising out of sudden accidents or other traumatic events that present a danger of immediate physical injury, causing fright and severe emotional distress. For example, in *McMillan v. National Railroad Passenger Corp.*, 648 A.2d 428, 434 (D.C. 1994), the court held that, under FELA and *Gottshall*, the zone of danger concept requires that plaintiff "was subject to a reasonable fear of *immediate* personal injury" (emphasis added). Accordingly, the plaintiff was not in a zone of danger by virtue of the proximity of a worker who had on occasion

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[14] Also cited by this Court in *Gottshall*, 512 U.S. at 548 n.9, were *Keck v. Jackson*, 593 P.2d 668 (Ariz. 1979) (*en banc*) (car accident); *Towns v. Anderson*, 579 P.2d 1163 (Colo. 1978) (*en banc*) (explosion); *Rickey v. Chicago Transit Authority*, 457 N.E.2d 1 (Ill. 1983) (escalator accident); *Bovsun v. Sanperi*, 461 N.E.2d 843 (N.Y. 1984) (automobile accidents); *Garrett v. City of New Berlin*, 362 N.W.2d 137 (Wis. 1985) (plaintiff in a group of children chased by police car). Conversely, the other recent zone of danger cases cited by this Court in *Gottshall*, 512 U.S. at 548 n.9, disallow recovery where the plaintiff was not at risk of, and did not fear, immediate physical injury: *Williams v. Baker*, 572 A.2d 1062 (D.C. 1990) (*en banc*); *Resavage v. Davies*, 86 A.2d 879 (Md. 1952); *Stadler v. Cross*, 295 N.W.2d 552 (Minn. 1980); *Asaro v. Cardinal Glennon Memorial Hosp.*, 799 S.W.2d 595 (Mo. 1990) (*en banc*); *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678 (N.D. 1972); *Shelton v. Russell Pipe & Foundry Co.*, 570 S.W.2d 861 (Tenn. 1978); *Boucher v. Dixie Medical Ctr.*, 850 P.2d 1179 (Utah 1992); *Jobin v. McQuillen*, 609 A.2d 990 (Vt. 1992).

punched other workers. The court emphasized that the "threat of injury" to the plaintiff (as is the case for plaintiff here) "was not immediate," but rather was "both speculative and remote." *Id.* at 434; *see also Vance v. Consolidated Rail Corp.*, 652 N.E.2d 776, 779, 783 (Ohio 1995) (plaintiff was in zone of danger because he was threatened with a chipping hammer and nearly run over with a truck by fellow employees, and thus placed in risk of immediate harm), *cert. denied*, 116 S. Ct. 776 (1996); *Grube v. Union Pac. R.R. Co.*, 886 P.2d 845, 851 (Kan. 1994) ("fear for one's safety is an essential element of the zone of danger test and must be expressed at or near the time of the danger"); *Garcia v. Burlington N. R.R. Co.*, 904 P.2d 1085, 1087 (Or. Ct. App. 1995) (under *Gottshall*, zone of danger "is a location in which the plaintiff is at 'immediate risk of physical harm'") (citation omitted).[15]

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[15] *See also Outten v. National R.R. Passenger Corp.*, 928 F.2d 74, 78 (3d Cir. 1991) (railroad worker a mile away from train collision could not recover under FELA for fright and emotional distress); *Gillman v. Burlington N. R.R. Co.*, 878 F.2d 1020, 1024-25 (7th Cir. 1989) (no emotional distress recovery under FELA for plaintiff who attempted to rescue co-worker but was not himself at high risk of physical injury in accident and did not fear for his own safety); *Wilson v. Consolidated Rail Corp.*, 810 F. Supp. 411, 416-17 (N.D.N.Y. 1993) (in pre-*Gottshall* FELA case, applying zone of danger test and requiring "traumatic event" that put plaintiff in fear for his personal safety); *Anselmi v. Penrod Drilling Corp.*, 813 F. Supp. 436, 442 (E.D. La. 1993) (Jones Act) (stating "claimant must have been objectively within a zone of danger, he must have feared at the time of the incident that his life or person was in danger"); *Crooks v. Metro-North Commuter R.R. Co.*, No. 93 Civ. 6030, 1994 WL 719683, at *2 (S.D.N.Y. Dec. 28, 1994) (working alone on tracks was not within "'zone of danger' of an imminent physical injury" as required under *Gottshall*); *Bianco v. Philadelphia, Bethlehem & New England R.R. Co.*, No. CIV. A. 93-4828, 1995 WL 89036, at *1, *3-4 (E.D. Pa. Mar. 2, 1995) (under *Gottshall*, no emotional distress recovery for plaintiff who refused to undergo training to drive locomotive, alleging that if he had ever driven a locomo-

Contrary to the Second Circuit's holding, the zone of danger test simply does not apply to this fear of disease case. Plaintiff is not complaining about a "near miss" accident or other traumatic event that he witnessed or experienced. Nor does plaintiff allege that his workplace exposure to asbestos placed him in danger of immediate personal injury or that he suffered fright. On the contrary, by its very terms, plaintiff's claim urges the antithesis of a risk of immediate harm: he bases his claim on an alleged risk of injury that may occur at some indefinite time in the future. As such, plaintiff's claim falls well outside the boundaries of the "zone of danger" test.

Indeed, not only is the Second Circuit alone in applying the zone of danger test in asbestos litigation, but other courts have expressly declined to do so. As the court in *Nutt v. A.C. & S., Inc.*, 466 A.2d 18 (Del. Super. Ct. 1983), *aff'd*, 480 A.2d 647 (Del. 1984), stated, because "[c]linical symptoms may not be observable until after many years of exposure, and disability may progress even after exposure has ceased . . . [t]he nature of the asbestos related injury, whether considered on an exposure or a manifestation basis, is clearly incompatible with the traumatic event requirement for recovery of mental anguish under [the zone of danger test]." 466 A.2d at 25; *see also Wisniewski*, 759 F.2d at 273-74 (rejecting argument of uninjured plaintiffs exposed to asbestos that zone of danger test allowed recovery for emotional distress).

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tive, railroad's inadequate training would have placed him in a zone of danger); *Dziegelewski v. Consolidated Rail Corp.*, No. 93 Civ. 2666, 1995 WL 63155 at *1-2, *3 (S.D.N.Y. Feb. 15, 1995) (allegations that supervisor angrily threw keys onto plaintiff's desk and forced plaintiff to drive when "exhausted," that malfunctioning septic tank caused unpleasant odors in workplace, and that defendant's cabooses were generally unsafe did not meet the zone of danger test).

Similarly, the Fifth Circuit rejected a plaintiff's argument that recovery for mental anguish allegedly caused by asbestos exposure was permitted under Louisiana's "ordeal" rule, a threshold standard for emotional distress claims that is essentially equivalent to the zone of danger test.[16] *See Adams*, 783 F.2d at 592-93. The Fifth Circuit explained that while the Louisiana cases "allowed recovery for mental anguish engendered by a proven traumatic ordeal which did not result in physical injury," such cases did not recognize any right of recovery for mental anguish arising from fear of future complications from asbestos exposure where plaintiff had not proved that he had sustained any present injury from such exposure. *Id.* at 593; *cf. Simmons*, 674 A.2d at 238 (disallowing recovery for emotional distress based on asbestos exposure in the absence of physical injury, stating that near-miss accident cases "are not analogous" to asbestos exposure cases where "no physical injury to any party has been established").[17]

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[16] In near-miss accident and other traumatic event cases, Louisiana's "ordeal" rule permits an uninjured plaintiff to recover for fright and mental anguish. *See Adams*, 783 F.2d at 593 (citing, *e.g., Carroll v. State Farm Ins. Co.*, 427 So. 2d 24 (La. Ct. App. 1983) (permitting recovery for mental anguish suffered by uninjured plaintiff who narrowly missed being struck by a motorboat that collided into the dock where she was sitting)).

[17] The Second Circuit erroneously analogized this case to *Marchica v. Long Island Railroad Co.*, 31 F. 3d 1197 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 727 (1995), a fear of AIDS case. In *Marchica*, the plaintiff was in fact in a zone of danger of immediate physical injury and felt contemporaneous fear of immediate physical injury -- infection with the AIDS virus which, once contracted, is nearly always fatal. Moreover, the plaintiff had been "stabbed" by a hypodermic needle, a coworker saw blood coming from the plaintiff's "puncture wound," 31 F. 3d at 1200, and the plaintiff's "emotional distress was the direct result of a *documented physical injury*." *Id.* at 1204 (emphasis added); *see also Murphy v. Abbott Labs.*, 930 F. Supp. 1083, 1086-87 (E.D. Pa.

In sum, the zone of danger test requires presence in the zone of imminent physical harm as a precondition to recovery for fright and emotional distress. Under the prevailing principles of law articulated in *Gottshall* and other cases, the zone of danger test does not permit recovery for alleged emotional distress or fear of future disease caused by mere exposure to asbestos.

B. The Second Circuit Improperly Applied the Physical Impact Test

The Second Circuit's decision to permit recovery turns upon its determination that plaintiff suffered a "physical impact," namely, exposure to asbestos. (JA 640) In ruling that plaintiff could recover on this basis, the Second Circuit incorrectly treats physical impact as a basis for recovery separate and apart from the requirement that plaintiff have been within the zone of danger.

The Second Circuit's error derives from its misunderstanding of certain language in *Gottshall* describing the zone of danger test as "limit[ing] recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." 512 U.S. at 547-48. With respect to the zone of danger requirement, this is not, as the Second Circuit appears to have concluded, a disjunctive test; on the contrary, in the very next sentence, this Court explained precisely what it meant: "That is, 'those within the zone of danger of physical impact can recover for fright, and those outside of it cannot.'" *Id.* at 548 (citation omitted).

Indeed, because "[w]hether the plaintiff has suffered an impact bears little relationship to the [emotional] harm,"

1996) (distinguishing fear of AIDS cases, where persons stuck by needles sustain physical injury, from asbestos exposure cases).

see Pearson, *supra*, at 488, the zone of danger test treats impacted and unimpacted plaintiffs alike: both must be in the zone of danger of immediate physical injury to recover. Thus, there exists no separate test under *Gottshall* which permits a FELA plaintiff to recover for negligent infliction of emotional distress whenever that plaintiff can demonstrate some sort of "physical impact," regardless of whether that plaintiff is in the zone of danger.

In fact, such an impact test was one of the "[t]hree major limiting tests for evaluating claims alleging negligent infliction of emotional distress" that this Court considered in *Gottshall*. *See* 512 U.S. at 546-47. This Court expressly declined to adopt such a test, rejecting it in favor of the zone of danger test. *See id.* at 556. This Court determined that the zone of danger test, with its requirement of a risk of imminent physical harm, was most "consistent with FELA's central focus on physical perils." *See id.* at 555 ("FELA was intended to provide compensation for the injuries and deaths caused by the *physical* dangers of railroad work") (emphasis added). The view of the Second Circuit and plaintiff that the zone of danger test adopted by this Court in *Gottshall* somehow subsumes a physical impact test is not supported by the language or logic of the decision, nor by the myriad cases applying the zone of danger test under the common law. These cases simply do not interpret the zone of danger test as incorporating a separate physical impact test that permits plaintiffs who were not threatened with immediate harm to recover.[18]

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[18] Moreover, even jurisdictions still following the physical impact test (as opposed to the zone of danger test) have placed special limitations on recovery for emotional distress based on exposure to asbestos that are not satisfied by the present case. For instance, although a Florida appellate court found that exposure to asbestos constituted a physical impact, the court established a special rule in asbestos cases requiring the presence of actual asbestos-related disease as a prerequisite to re-

Interpreting the zone of danger test, as the Second Circuit has done, to include a separate impact test that has nothing to do with the zone of danger and the concomitant risk of imminent harm would give rise to the absurd and much criticized results that have led many jurisdictions to abandon the old "physical impact" test. *See, e.g.*, W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* 363-65 (5th ed. 1984) (noting the expansion of the meaning of the "impact" test and observing: "The magic formula 'impact' is pronounced; the door opens to the full joy of a complete recovery.") (citation omitted). Although early cases under the old impact rule required a physical injury caused by an impact, *see, e.g., Boston v. Chesapeake & O. Ry. Co.*, 61 N.E.2d 326, 327 (Ind. 1945), gradually the impact rule was relaxed, as courts struggled to find a way to allow recovery in cases where an uninjured plaintiff had suffered great fright and emotional trauma from a near-miss accident. *See Bloom v. Consolidated Rail Corp.*, 41 F.3d 911, 916 n.6 (3d Cir. 1994). However, the basic flaw remained under the impact test that a near-miss plaintiff who had suffered no physical injury and no physical impact, but had suffered debilitating fright, shock and emotional distress, was not allowed to recover. *See, e.g. Rossi*, 210 A.2d at 714. Thus, the impact test was a partial and imperfect solution to the problem of the near-miss plaintiff.

In some jurisdictions, the impact rule was further diluted to allow recovery in cases where there had been an impact of any kind however slight, regardless of whether there had

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covery for emotional distress. *See Eagle-Picher*, 481 So. 2d at 527-28. As the court in *Eagle-Picher* pointed out, the special physical injury requirement in exposure cases is "necessary and fair." *Id.* at 528. Millions of people have been exposed to asbestos and other harmful substances. Permitting a cause of action for emotional distress on the basis of "impact" (*i.e.*, exposure) alone would result in unlimited liability for defendants as well as an immense burden on the courts. *See id.*

been an accident, a near accident, or a zone of danger. Finally, as Professors Prosser and Keeton observe, "[a] Georgia circus case reduced the matter to something of an absurdity by finding 'impact' where the defendant's horse 'evacuated his bowels' into the plaintiff's lap." Keeton, *supra*, at 364 (citation omitted). This is *not* the rule that this Court adopted in *Gottshall*. Rather, the zone of danger test, as adopted in *Gottshall*, removes the rationale for the diluted and arbitrary "physical impact" test by allowing both impacted and unimpacted plaintiffs to recover for emotional distress provided their distress arose from fright caused by the threat of imminent physical harm while in the zone of danger. *See Bloom*, 41 F.3d at 916 n.6.

Moreover, the zone of danger test did not grow out of the physical impact test, but rather developed as a separate and better approach to the problem of the near-miss plaintiff -- one that did not restrict recovery based on the fortuity of whether or not some impact occurred. The early zone of danger cases allowed near-miss plaintiffs to recover not for emotional distress *per se*, but for physical injuries (*e.g.*, a miscarriage) caused by fright and emotional distress. *See, e.g., Purcell*, 50 N.W. at 1034. The analytical hurdle that the courts perceived in these early cases had to do with indirect causation -- fright, not a direct physical force, being the cause of the plaintiff's physical injury. *See id.* at 1035; *Stewart*, 36 So. at 677. In adopting the zone of danger test, these courts reasoned that a defendant's negligence could be a proximate cause of a plaintiff's physical injury even though there was an intervening link -- fright and shock -- in the chain of causation. *See Purcell*, 50 N.W. at 1035; *Stewart*, 36 So. at 677-78. The final step in the development of the zone of danger jurisprudence was to recognize severe emotional distress itself as a compensable injury if the plaintiff was in the zone of danger, with the physical consequences of the

plaintiff's emotional distress serving to guarantee the genuineness of the distress. *See, e.g., Williams v. Carnival Cruise Lines, Inc.*, 907 F. Supp. 403, 406-07 (S.D. Fla. 1995) (permitting recovery for emotional distress under the zone of danger test while requiring physical manifestation to guarantee genuineness).

Thus, the zone of danger test developed not as an outgrowth of the physical impact test, but as a distinct approach, with its own coherent logic, to the problem of the near-miss plaintiff. Under that approach, there is no reason to incorporate a separate "physical impact" test, and in fact nothing in the early or more recent decisions that set forth the zone of danger test suggests in any way that a separate "physical impact" test is contemplated under the zone of danger test. Indeed, in *Robb*, cited by this Court in *Gottshall*, 512 U.S. at 548 n.9, the Delaware Supreme Court, in adopting the zone of danger test, makes clear that the zone of danger test does not subsume a physical impact test. The court specifically criticizes the "token impact" required under the impact test, stating:

> If more were needed to warrant a declination to follow the [physical impact rule], reference to the fictional and mechanical ends to which the impact rule has been carried would suffice for the purpose. The most trivial bodily contact, itself causing little or no injury, has been considered sufficient . . . . Token impact sufficient to satisfy the rule has been held to be a slight bump against the seat, dust in the eyes, inhalation of smoke, a trifling burn, *jostling* in an automobile, indeed any degree of physical impact, however slight.

Robb, 210 A.2d at 713-14 (citations omitted). Opining that the "impact rule 'is almost certainly destined for ultimate

extinction,'" the Delaware Supreme Court adopted the zone of danger test, holding that where negligence proximately causes fright, "one within the immediate area of physical danger from that negligence" is entitled to recover. *Id.* at 714-15. This rule, according to the court, is "the better rule, supported by reason, logic and fairness." *Id.* at 715.

In sum, the Second Circuit erroneously permitted plaintiff to recover for emotional distress for fear of future injury based on the "physical impact" test. Under the zone of danger test adopted by this Court in *Gottshall*, a plaintiff can recover for emotional distress only if he was in the zone of danger of imminent physical harm created by an accident or other traumatic event and so suffered fright and resultant emotional injury. These requirements are not met in this asbestos exposure case. Moreover, the policy reasons articulated by this Court in *Gottshall* also support a rule limiting recovery for emotional distress based on asbestos exposure to cases where the plaintiff has developed an asbestos-related disease or injury. The Second Circuit's decision to the contrary is an unsound and erroneous expansion of liability.

III. THE SECOND CIRCUIT, IN CONTRAVENTION OF *GOTTSHALL*'S MANDATE, DISCARDED WELL-ESTABLISHED COMMON LAW LIMITATIONS ON RECOVERY FOR EMOTIONAL DISTRESS

Not only did plaintiff fail to meet the requirements of the threshold zone of danger test, but his alleged distress also does not meet the further requirements that the common law imposes -- and the Second Circuit rejected -- to place rational limits on liability for negligent infliction of emotional distress. The Second Circuit discarded the widely accepted requirements that a plaintiff's emotional distress must result in a physical manifestation, be severe, and be substantiated by competent medical, psychiatric or clini-

cal evidence.[19] These requirements are necessary to establish that a plaintiff claiming emotional distress has actually suffered an injury, which is an essential element of any claim under FELA and the common law. *See Gottshall*, 512 U.S. at 542; *Schweitzer*, 758 F.2d at 942. The Second Circuit's abandonment of these limitations creates an unprecedented expansion of liability for negligent infliction of emotional distress, a result that is in direct conflict with this Court's mandate in *Gottshall* to preserve common law limitations on recovery for such claims. As this Court observed in *Gottshall*, "[o]ur FELA cases require that we look to the common law . . . , and the common law restricts recovery for negligent infliction of emotional distress on several policy grounds: the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." 512 U.S. at 557; *see also id.* at 544 (common law principles "must play a significant role" and "are entitled to great weight" in analysis of negligent infliction of emotional distress under FELA).

A. The Second Circuit Erred in Holding That No Physical Manifestation of Emotional Distress Is Required

The Second Circuit declined to require that plaintiff's alleged emotional distress manifest itself in physical symptoms. (JA 644) With this ruling, the Second Circuit contravened the "overwhelming weight of authority across the nation," which holds that to be compensable, emotional distress must result in "some physical manifestation." *Plummer v. Abbott Labs.*, 568 F. Supp. 920, 926-27 (D.R.I.

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[19] These issues were not, and need not have been, addressed in *Gottshall* because both plaintiffs clearly satisfied all three of these requirements. *See* 512 U.S. at 535-37, 539.

1983).[20] Indeed, as this Court observed in *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, "[o]ne leading commentary states that '[i]n the great majority of cases allowing recovery the genuineness of the mental disturbance has been evidenced by resulting physical illness of a serious character.'" 480 U.S. 557, 569 n.18 (1987) (quoting Keeton, *supra*, at 64).

In *Gottshall*, this Court noted that "[m]any jurisdictions that follow the zone of danger or relative bystander tests also require that a plaintiff demonstrate a 'physical manifestation' of an alleged emotional injury, that is, a physical injury or effect that is the direct result of the emotional injury, in order to recover." 512 U.S. at 549 n.11. Moreover, as Justice Ginsburg recognized in her dissent, the adoption of a physical manifestation requirement is an important safeguard of the genuineness of emotional distress claims. *See id.* at 568-69 (Ginsburg, J., dissenting).

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[20] For other cases requiring physical manifestation of an alleged emotional injury, *see, e.g., Robb*, 210 A.2d at 714-715 (Del.); *Hatfield v. Max Rouse & Sons Northwest*, 606 P.2d 944, 955 (Idaho 1980); *Payton v. Abbott Labs*, 437 N.E.2d 171, 181 (Mass. 1982); *State ex rel. Woyke v. Tonka Corp.*, 420 N.W.2d 624, 627 (Minn. Ct. App. 1988); *Sears Roebuck & Co. v. Young*, 384 So. 2d 69, 71, 73 (Miss. 1980); *Corso v. Merrill*, 406 A.2d 300, 308 (N.H. 1979); *Falzone v. Busch*, 214 A.2d 12, 17 (N.J. 1965); *Melton v. Allen*, 580 P.2d 1019, 1021-22 (Or. 1978); *Reilly v. United States*, 547 A.2d 894, 896-97 (R.I. 1988); *Nelson v. WEB Water Dev. Ass'n*, 507 N.W.2d 691, 699 (S.D. 1993); *Hughes v. Moore*, 197 S.E.2d 214, 219 (Va. 1973); *Vaillancourt v. Medical Ctr. Hosp.*, 425 A.2d 92, 95 (Vt. 1980). Courts have also required physical manifestation in determining whether emotional injury is compensable under workers' compensation statutes. *See, e.g., Seitz v. L & R Indus., Inc.*, 437 A.2d 1345 (R.I. 1981) (psychic injury which neither results in nor is caused by physical injury is not compensable under Rhode Island worker's compensation statute).

The majority view that physical manifestation is required is also reflected in the Restatement (Second) of Torts, which states:

> If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.

Restatement (Second) of Torts § 436A (1965).

Significantly, the requirement of physical illness or injury resulting from the plaintiff's fright was the prevailing rule at the time of FELA's enactment in 1908.[21] *Cf. Gottshall*, 512 U.S. at 554-55 (looking to "state of the common law in 1908, when FELA was enacted" and noting "historical pedigree" of zone of danger test). In addition, contrary to the Second Circuit, courts in recent cases have specifically required a physical manifestation of emotional distress under FELA. *See Williams*, 907 F. Supp. at 406-07 (applying *Gottshall* and requiring that emotional distress be accompanied by "physical manifestation" under FELA and Jones Act); *Amendola*, 699 F. Supp. at 1410 (pre-*Gottshall*, requiring asbestos plaintiff under FELA to show physical harm either causing or caused by emotional distress); *cf. Ellenwood v. Exxon Shipping Co.*, 795 F. Supp. 31, 34-35 (D. Me. 1992) (in light of FELA and Jones Act case law, requiring physical manifestation under

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[21] Thus, in all the early zone of danger cases cited by this Court in *Gottshall*, the plaintiff is described as having some physical illness or other physical injury resulting from his or her emotional distress. *See supra* at note 13 and accompanying text.

general maritime law), *aff'd in relevant part*, 984 F.2d 1270 (1st Cir.), *cert. denied*, 508 U.S. 981 (1993).

As these courts have recognized, the physical manifestation requirement furthers the fundamental policy concerns that this Court identified in *Gottshall* for imposing limitations on liability. *See Amendola*, 699 F. Supp. at 1411 (the physical manifestation test "will serve to limit trivial, frivolous, or premature claims" under FELA). The Restatement also emphasizes these policy concerns:

> [E]motional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial . . . . It is likely to be so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for it would unduly burden the courts and the defendants.

Restatement (Second) of Torts § 436A cmt. b (1965).

In sum, absent a requirement of physical manifestation, a defendant's liability for claims of emotional distress under FELA would be unpredictable and nearly infinite -- the very result the common law limitations on emotional distress claims were designed to avoid. *See Gottshall*, 512 U.S. at 551-52.

B. The Second Circuit Incorrectly Held That Emotional Distress Is Compensable Even If It Is Not Severe

The Second Circuit also departed from well-settled common law principles in holding that plaintiff could recover for emotional distress that, as the Second Circuit acknowledged, was not severe. (JA 647) Contrary to the Second Circuit's holding, courts have overwhelmingly ruled that there can be no recovery for the negligent infliction of

emotional distress if the distress is not severe. As this Court observed in *Buell*, 480 U.S. at 567 n.13, "severe emotional injury . . . has generally been required to establish liability for purely emotional injury." *See also Roberts v. Saylor*, 637 P.2d 1175, 1180 (Kan. 1981) ("it is only when emotional distress is extreme that possible liability arises"); *Parkway*, 901 S.W.2d at 444 (requiring a "high degree of mental pain and distress" that is "more than mere worry, anxiety, vexation, embarrassment or anger");[22] *cf.* Keeton, *supra*, at 364-65 (even the "handful of courts" that have relaxed the physical manifestation rule require "serious emotional distress"). In fact, Metro-North has found no case that supports the Second Circuit's claim that "emotional distress must be 'severe' only when a plaintiff has not suffered a physical impact."[23] (JA 647)

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[22] *Accord Parrish v. Omaha Pub. Power Dist.*, 496 N.W.2d 914, 915 (Neb. 1993) (requiring emotional distress "so severe that no reasonable person could have been expected to endure" it); *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, 395 S.E.2d 85, 97 (N.C. 1990) (requiring severe emotional distress defined as "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia or any other type of severe and disabling emotional or mental condition"); *see also Williams v. Baker*, 572 A.2d at 1068 (D.C.); *Rodrigues v. State*, 472 P.2d 509, 520 (Haw. 1970); *Poulsen v. Russell*, 300 N.W.2d 289, 297 (Iowa 1981); *Robertson v. Geophysical Serv., Inc.*, 469 So. 2d 22, 24 (La. Ct. App. 1985); *Culbert v. Sampson's Supermarkets Inc.*, 444 A.2d 433, 437 (Me. 1982); *K.A.C. v. Benson*, 527 N.W.2d 553, 559 (Minn. 1995); *Ironbound Health Rights Advisory Comm'n v. Diamond Shamrock Chems. Co.*, 578 A.2d 1248, 1250 (N.J. Super. Ct. App. Div. 1990); *Muchow v. Lindblad*, 435 N.W.2d 918, 923 (N.D. 1989); *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 442-43 & n.23 (Wis. 1994).

[23] The Second Circuit's reliance on two trial court decisions (JA 647) is misplaced. *Lacy v. Cooper Hospital/University Medical Center*, 745 F. Supp. 1029, 1035 (D.N.J. 1990), does not discuss physical impact or distinguish between severe and non-severe emotional distress, but rather applies a longstanding exception to the threshold physical injury requirement in cases where a corpse has been mishandled. *See* Keeton, *supra*, at 362. *Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476, 478 (Ohio Ct. C.P. 1987), involved a plaintiff who had an actual physical injury (asbestosis). Moreover, Restatement (Second) of Torts § 436A, cited by the Second Circuit, requires physical harm, not merely physical impact.

Numerous courts and commentators have noted that the severity requirement serves not only to guarantee the genuineness of emotional distress claims, but also to limit the variability and unpredictability of awards for emotional distress and the unlimited liability that would result if relatively trivial emotional distress were compensable. *See, e.g., Parkway*, 901 S.W.2d at 443-44. Moreover, like the physical manifestation requirement, the severity requirement accords with the purposes of FELA. As this Court observed in *Gottshall*, the basic rationale for finding that emotional injury is an injury within the meaning of Section 1 of FELA was the recognition that "severe emotional injuries can be just as debilitating as physical injuries." 512 U.S. at 550. It is within the purpose of the statute to compensate such injuries; it is not within the purpose of the statute to compensate non-severe emotional distress of the kind alleged by plaintiff in this case.

Indeed, the Second Circuit appears to have been motivated throughout its opinion by the desire to punish Metro-North for its negligent conduct rather than to compensate plaintiff. The Second Circuit acknowledged that the plaintiff has no physical injury, can offer no evidence of clinical disease, and does not allege severe emotional distress. (JA 641-42; JA 647;) Under long established principles of the law of negligence, there is no injury, emotional or physical, in this case to compensate. By permitting such a case to go to a jury, the Second Circuit has abdicated the courts' traditional function of screening legally meritless

claims and invited the jury improperly to focus on the defendant's negligent behavior and impose a penalty.

C. The Second Circuit Erred by Not Requiring Medical or Psychiatric Evidence of Emotional Distress

The Second Circuit overturned the trial court's finding that plaintiff presented no objective evidence of his emotional distress. (JA 646-47) To reach this result, the Second Circuit departed from the well-established common law rule imposing upon plaintiffs the burden of presenting some objective medical, psychiatric or clinical evidence of alleged emotional distress.[24]

The rationale for this basic evidentiary requirement is similar to the policy considerations discussed above which underlie the other common law requirements for negligent infliction of emotional distress. In particular, courts have observed that the requirement of medically provable and diagnosable mental distress defines an appropriate middle ground of liability, between the "Scylla of unlimited liabili-

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[24] *See, e.g., Aurora v. Burlington N. R.R. Co.*, 31 F.3d 724, 726 (8th Cir. 1994) (Nebraska law) (requiring proof of "medically significant" emotional distress; testimony by psychiatrist that plaintiff was "anxious and depressed" but did not need medication or follow up treatment was insufficient as a matter of law); *accord Kadans v. Citicorp Mortgage, Inc.*, 26 F.3d 131 (9th Cir. 1994) (unpublished, table; text at 1994 WL 242112, at *1) (Nevada law); *Silver v. Mendel*, 894 F.2d. 598, 607 n.19 (3d Cir.) (Pennsylvania law), *cert. denied*, 496 U.S. 926 (1990); *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1406 (W.D. Mo. 1994); *Bass v. Nooney Co.*, 646 S.W.2d 765, 772-73 (Mo. 1983) (*en banc*); *Parrish*, 496 N.W.2d at 915-16 (Neb.); *Kohn v. Schiappa*, 656 A.2d 1322, 1325 (N.J. Super. Ct. Law Div. 1995); *Leone v. Leewood Serv. Station, Inc.*, 624 N.Y.S.2d 610, 613 (App. Div.), *appeal denied*, 658 N.E.2d 221 (N.Y. 1995); *Muchow*, 435 N.W.2d at 923 (N.D.); *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 974-75 (Utah 1993).

ty" which would result from a "broad definition of 'emotional harm' -- one which includes upset, anger, and grief" -- and the "Charybdis of no liability" which would result from a requirement of permanent mental damage. *Bass v. Nooney Co.*, 646 S.W.2d 765, 773 n.4 (Mo. 1983) (*en banc*) (quoting Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35 U. Chi. L. Rev. 512, 517 (1968)).

In this case, the evidence cited by the Second Circuit indisputably does not meet the common law standard of proof. Plaintiff presented *no* medical or psychiatric evidence of emotional distress. He never consulted a psychiatrist, social worker, or counselor, (JA 519-20), and his own expert testified that he did not display a level of concern warranting counseling. (JA 205-06; JA 624-25) Indeed, even the Second Circuit characterized the evidence it cited of plaintiff's emotional distress as "slim." (JA 647) That evidence consisted of complaints by Metro-North employees about working conditions and of plaintiff's own conclusory allegations of fear and anger. (JA 646-47) Such evidence does not constitute proof of emotional distress, much less the required objective medical or psychiatric proof.

There is no support in the common law to permit such a totally unverified claim of emotional distress to go to a jury. Moreover, under Section 1 of FELA, a compensable injury is a mandatory statutory element of a cognizable claim, and it is an element which plaintiff must prove. *See In re Asbestos Prods. Liab. Litig.*, 1996 WL 239863, at *3. The Second Circuit has effectively removed the need not only for objective medical or psychiatric proof of emotional injury, but the need for any objective evidence whatso-

ever.[25] Under the Second Circuit's standard, a plaintiff's conclusory allegations of the most trivial and transitory distress will suffice to establish a compensable emotional injury. The Second Circuit's ruling is contrary to well-settled common law principles and common sense and warrants reversal by this Court.

IV. THE SECOND CIRCUIT ERRED IN ALLOWING AN ASYMPTOMATIC PLAINTIFF TO RECOVER MEDICAL MONITORING DAMAGES UNDER FELA

The Second Circuit determined that plaintiff's separate claim for medical monitoring damages was cognizable under FELA "despite the fact that he has yet to suffer an asbestos-related disease." (JA 649) With this holding, the Second Circuit took the radical step of reading FELA as permitting damages in the absence of any injury, in direct contravention of the statute's express injury requirement. Metro-North respectfully submits that the Second Circuit's ruling on medical monitoring is erroneous both as a matter of statutory construction and as matter of federal common law under FELA. Moreover, the Second Circuit's holding ignores compelling policy reasons why medical monitoring damages should not be granted in the absence of injury, policy reasons that affect not only the interests of defendants in being free from a potentially limitless and undefined liability, but also the interests of plaintiffs who have

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[25] In refusing to require objective medical, psychiatric or clinical evidence, the Second Circuit inappropriately relied on civil rights cases under 42 U.S.C. § 1983. In such civil rights cases, an independent constitutional tort, with an injury such as job discrimination or false imprisonment, serves as the basis for awarding emotional distress damages flowing from the tort. *See, e.g., Bolden v. Southeastern Pa. Trans. Auth.*, 21 F.3d 29, 34 (3d Cir. 1994) (citing *Carey v. Piphus*, 435 U.S. 247 (1978)); *Miner v. City of Glen Falls*, 999 F.2d 655, 662 (2d Cir. 1993). No such independent tort exists in this case.

a present physical injury in obtaining a speedy, just resolution of their claims.

A. FELA's Statutory Injury Requirement Forbids Medical Monitoring Damages in the Absence of Present Injury

Section 1 of FELA provides that railroad employees may sue their employers for "*injury* or death resulting in whole or in part from the negligence" of the railroad, its officers, employees and agents. 45 U.S.C. § 51 (emphasis added). In construing this statutory language, this Court has held that "injury" includes physical injuries from accidents, which were Congress's primary focus in enacting FELA in 1908, occupational diseases such as silicosis, and emotional injuries that meet the threshold standard of the zone of danger test. *See Gottshall*, 512 U.S. at 542-43, 556. In no case, however, has this Court or any other court -- except for the Second Circuit here -- extended FELA to allow damages for other than a present, existing injury.

In *Gottshall*, this Court set forth the analysis for deciding whether a category of claims involves an "injury" that is cognizable under FELA. First, a court "must look to FELA itself, its purposes and background, and the construction we have given it over the years." *Id.* at 541. Second, "because 'FELA jurisprudence gleans guidance from common-law developments,' [the court] must consider the common law's treatment of the right of recovery asserted by [the plaintiff]." *Id.* at 541-42 (citation omitted).

The Second Circuit, in its decision in this case, skipped the first step in the mandated analysis by failing to consider the words of the statute itself. Clearly, under the express terms of FELA, there can be no recovery unless the plaintiff has suffered an "injury" within the meaning of section 1. Rather than addressing the statutory language,

however, the Second Circuit merely commented that "[i]t is hornbook law that a plaintiff may recover reasonable past and future medical expenses *incurred as a result of an injury*." (JA 648 emphasis added)

The proposition cited by the Second Circuit is unexceptionable. But it does not support what the Second Circuit has done, namely to treat a claim for medical monitoring as a separate cause of action in and of itself, rather than as damages that may be awarded upon the plaintiff's establishing a compensable injury. As the Fourth Circuit explained in *Ball*, 958 F.2d at 39, "[a] claim for medical surveillance costs is simply a claim for future damages."[26] The Fourth Circuit observed that "such relief is only available where a plaintiff has sustained a physical injury that was proximately caused by the defendant." *Id.* Therefore, in *Ball*, the court rejected the plaintiffs' claim for medical monitoring because they "ha[d] not demonstrated that they are suffering from a present, physical injury that would entitle them to recover medical surveillance costs." *Id.*

FELA's statutory injury requirement clearly mandates the application of these same principles that were relied upon by the court in *Ball*. In its decision, the Second Circuit ignored the dispositive fact that, under the applicable caselaw of this Court, plaintiff in this case suffered no "injury" that could serve as the statutory -- and factual -- basis for his claim under FELA for medical monitoring damages. In *Urie*, 337 U.S. at 170, this Court held that under FELA

[26] Similarly, the hornbook relied on by the Second Circuit recognizes medical monitoring costs as a type of damages that flow from a personal injury. *See* Charles T. McCormick, *Handbook on the Law of Damages* § 90, at 323-24 (1935); *accord, e.g.*, 1 Jacob A. Stein, *Stein on Personal Injury Damages* § 5.18, at 247 (2d ed. 1991); *Thomas*, 846 F. Supp. at 1410; *Purjet v. Hess Oil Virgin Islands Corp.*, Civ. No. 1985/284, 1986 WL 1200, at *4 (D.V.I. Jan. 8, 1986).

a worker exposed to a potentially harmful substance is not "injured," and thus may not be deemed to have a cause of action, until and unless "the accumulated effects of the deleterious substance manifest themselves." *See also Schweitzer*, 758 F.2d at 942. Here, the accumulated effects, if any, of plaintiff's asbestos exposure have not manifested themselves in any way; indeed, plaintiff is totally asymptomatic. X-rays of plaintiff's lungs show no pleural plaques or thickening and no traces or effects whatsoever of asbestos exposure (JA 73-74); his pulmonary function tests are normal. (JA 73-74)

Indeed, even where a plaintiff has pleural thickening or scarring, courts have held that, unless actual impairment is present, such scarring and thickening are mere changes or alterations that do not constitute a compensable physical injury. *See, e.g., Owens-Illinois v. Armstrong*, 591 A.2d 544, 561 (Md. Ct. Spec. App. 1991), *aff'd in part, rev'd in part on other grounds*, 604 A.2d 47 (Md.), *cert denied*, 506 U.S. 871 (1992); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. at 1567; *see also Restatement (Second) of Torts* §§ 15, 7 cmt. b (1965) (physical injury requires impairment, pain or illness; it "implies a loss or detriment to a person, and not a mere change or alteration"); *Schweitzer*, 758 F.2d at 942 (subclinical changes from asbestos exposure do not constitute the "actual loss or damage . . . required to sustain a cause of action under generally applicable principles of tort law").[27] Under these well-reasoned authorities, it is evident that plaintiff here suffers from no cognizable injury to support medical monitoring damages

[27] *Accord, e.g., Bernier*, 516 A.2d at 543; In re Asbestos Prods., 1996 WL 239863, at *3; *Caputo v. Boston Edison Co.*, CIV. A. No. 88-2126-Z, 1990 WL 98694, at *3-4 (D. Mass. July 9, 1990), *aff'd*, 924 F.2d 11 (1st Cir. 1991); *Batko*, 1986 WL 5761, at *1; *Hayes v. ACandS, Inc.*, 95 CH 1835, slip op. at 13 (Ill. Cir. Ct. Oct. 30, 1996).

under FELA. *See Batko*, 1986 WL 5761, at *1, *3 (denying claims for future medical costs under FELA where plaintiffs had been exposed to asbestos but had no injury).

Such a construction of FELA, denying medical monitoring in the absence of an existing physical injury, is supported by case law interpreting analogous language in other statutes. For example, in *Ball*, the court concluded that exposure to a toxic chemical, without resulting disease or injury, is not a compensable "injury" under two states' worker's compensation statutes. Thus, plaintiffs had no viable medical monitoring claim under those statutes. 755 F. Supp. at 1371.[28]

Moreover, even if one assumes *arguendo* that plaintiff in this case suffered an emotional injury compensable under FELA, the medical monitoring damages plaintiff seeks to recover have no factual nexus to that injury. Plaintiff is not seeking medical monitoring of his mental or emotional state. Rather, his medical monitoring claim relates to the possibility that he may later develop an asbestos-related injury. Plaintiff's own expert testified that plaintiff has no

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[28] None of the medical monitoring cases cited by the Second Circuit arises under FELA or any other statute imposing a comparable "injury" requirement. Moreover, the validity of the prediction in the Third Circuit's decisions in *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990), *cert. denied*, 499 U.S. 961 (1991), and 35 F.3d 717 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1253 (1995), that Pennsylvania common law would allow medical monitoring damages in the absence of physical injury has been severely undermined. Recent federal district court decisions read *Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996), "as holding that mere exposure to significant levels of asbestos, without a demonstrable physical consequence such as pleural thickening, does not support a claim for medical monitoring." *Fried v. Sungard Recovery Servs. Inc.*, 936 F. Supp. 310, 311 (E.D. Pa. 1996); *see also Fried v. Sungard Recovery Servs. Inc.*, 925 F. Supp. 375, 376-77 (E.D. Pa. 1996).

discernible physical effects of asbestos exposure (JA 135), much less an actual asbestos-related physical "injury" which could serve as a basis for recovering medical monitoring damages. Therefore, the Second Circuit's ruling that plaintiff's claims for medical monitoring could go forward is plainly incorrect as a matter of statutory construction.

B. Plaintiff's Claim for Medical Monitoring Damages Is Contrary to Settled Common Law Principles and Public Policy

Not only did the Second Circuit fail to address FELA's statutory language in allowing this uninjured plaintiff to recover medical monitoring damages, but it also failed to adhere to well established common law principles, as mandated in *Gottshall*, 512 U.S. at 554-55. In its analysis, the Second Circuit failed to acknowledge the fact that a claim for medical monitoring costs where a plaintiff has suffered no present physical injury is a novel theory of damages that is contrary to traditional common law principles and, indeed, has been recognized in only a small minority of jurisdictions. The traditional tort law of negligence conditions recovery of damages on an existing injury. *See* Restatement (Second) of Torts § 902 & cmt. a (1965) ("Damages flow from an injury."). Actual injury is required for a negligence cause of action; the "threat of future harm, not yet realized, is not enough." Keeton, *supra*, at 165. Indeed, courts have relied on this principle in dismissing medical monitoring claims based on exposure to asbestos or other potentially harmful substances, where (as here) there is no present injury or disease. For example, in *Purjet*, the court held that "[s]uch relief is . . . appropriate only when a demonstrable *injury* caused by a negligent act increases the possibility of developing ailments in the future." 1986 WL 1200, at *4 (emphasis added); *accord, e.g.*, *Ball*, 958 F.2d at 39; *Thomas*, 846 F. Supp. at 1410; *Carroll v. Litton Sys., Inc.*, No. B-C-88-253, 1990 WL

312969, at *51-52 (W.D.N.C. Oct. 29, 1990); *Hayes*, slip op. at 13 (citing *Schweitzer* and *Betts v. Manville Personal Injury Settlement Trust*, 588 N.E.2d 1193, 1217 (Ill. Ct. App. 1992)). It is the departure from this basic principle that has made medical monitoring claims in the absence of injury "one of the most controversial topics in tort law today." Terry Christovich Gay & Paige Freeman Rosato, *Combatting Fear of Future Injury and Medical Monitoring Claims*, 61 Def. Couns. J. 554, 557 (1994).

In construing FELA, this Court has gleaned guidance from the common law, in particular, from the status of a particular class of claims under the common law at the time of FELA's enactment. Thus, the Court has considered the "historical pedigree" of a claim in determining whether a claim is cognizable under FELA. *See Gottshall*, 512 U.S. at 554-55 (examining "state of the common law in 1908, when FELA was enacted" and emphasizing "historical pedigree" of zone of danger test). Plaintiff's claim for medical monitoring damages in the absence of any present physical injury is completely lacking in the historical pedigree that could potentially bring it within the intent of Congress in enacting FELA.

In embracing this novel claim, the Second Circuit disregarded the fundamental policy considerations for limiting liability identified by this Court in *Gottshall*. Such policy concerns have been at the heart of decisions denying recovery under state common law for medical monitoring in the absence of physical injury. As one court has observed:

> There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants.

Ball v. Joy Manufacturing Co., 755 F. Supp. 1344, 1372 S.D. W. Va 1990), *aff'd*, 958 F.2d 36 (4th Cir. 1991).

As the *Ball* court recognized, opening the courthouse door to uninjured plaintiffs seeking medical monitoring damages will consume scarce judicial resources, postponing and quite possibly precluding recovery for the injured. *See id.* ("Allowing today's generation of exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiffs being remediless."). As Professor Schuck observes, "[a]s between the claims of the already impaired and the claims of those who are not now (and may never become) sick, . . . society should accord higher priority to the former." Schuck, *supra*, at 575-76.

In addition, "[w]hile the perception seems to be that [medical monitoring] damages are a relatively inexpensive means of addressing potential problems, the reality is that damages for medical surveillance costs can be staggering, especially in cases involving multiple plaintiffs." Eric W. Wiechmann, *Curse of the Unsick: Update on Latent Injury Claims in Toxic Tort Cases*, The Brief, Summer 1996 at 10, 44. As the court in *Ball* noted, "defendants' pockets or bank accounts do not contain infinite resources." *Ball*, 755 F. Supp. at 1372. "Some asbestos defendants may not possess enough money to pay present and, if trends continue, future claimants the current litigation value of their claims."[29] Schuck, *supra*, at 557. Thus, medical monitoring claims for the uninjured will be competing for the "same rapidly shrinking fund" available to compensate plaintiffs with actual physical injuries. *See id.*; Gay &

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[29] To date, at least sixteen companies have been forced into bankruptcy by the costs of asbestos litigation. *See* N.Y.L.J., Feb. 6, 1995, at 7.

Rosato, *supra*, at 563. Moreover, requiring employers governed by FELA to pay for future medical monitoring costs for every employee who stands even a remote chance of developing a workplace-related illness would improperly render employers virtual insurers of their workers' health. *See Gottshall*, 512 U.S. at 543 (FELA "does not make the employer the insurer of the safety of his employees").

Furthermore, according to Professor Schuck, evidence suggests that medical monitoring is not appropriate in the asbestos context -- "effective screening procedures are not yet available [for some asbestos conditions], and in others early detection does not improve the prospects of cure." Schuck, *supra*, at 576-77. Therefore, "it seems difficult to justify expending the diminishing resources available for compensation in this particular way." *Id.* at 577.

Ultimately, however, in this case, it is not up to the courts to resolve the policy questions raised by the medical monitoring claim asserted by this totally asymptomatic plaintiff. The statute is clear: such a claim is not permitted under FELA in the absence of a present injury. The courts may not rewrite the statute; it is up to Congress, if it desires to do so, to change the law to permit such a claim.

CONCLUSION

The Second Circuit's decision should be reversed and the directed verdict in favor of Metro-North reinstated.

Respectfully Submitted,

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